

51. NAB agrees that the definition of pre-rule programming in the *Notice* may be too narrow, and that it would implicitly deprive broadcasters and producers of flexibility in implementing captions.¹³⁷ NAB maintains that our proposed schedule allows stations to air declining amounts of new programs without captions until full captioning requirements are in place. Thus, if programs that were properly produced and aired without captions during the transition period are not reclassified, they would have to be captioned for any further exhibition, even if the burden of doing so would be high.¹³⁸ The alternative to captioning such programs would be to remove them from distribution, which would contravene Congress' intent. Thus, NAB proposes that the definition of "pre-rule programming" include both programs first published or exhibited before the effective date of our rules and programs first published or exhibited after that date without captions.¹³⁹

52. In addition, numerous commenters request clarification that any captioning requirements apply only to programs that are actually aired subsequent to the effective date of the rules, rather than to all previously produced programming.¹⁴⁰

53. Pre-Rule Programming Benchmarks. Video industry commenters addressing this topic recommend that we set no requirements or even targets for pre-rule programming.¹⁴¹ They assert that market forces have resulted in high levels of captioning of library product to date, and will continue to ensure the captioning of such materials.¹⁴² They contend that: (a) a captioning requirement for pre-rule programming will reduce the amount and variety of programming available to all viewers;¹⁴³ (b) the percentage of captioned "library" materials will naturally increase as the phase-in schedule for non-exempt new programming progresses and new programs "age" into "library" programs;¹⁴⁴ and (c) it would be

¹³⁷ NAB Comments at 10.

¹³⁸ *Id.* at 10-11.

¹³⁹ *Id.* at 11.

¹⁴⁰ CAN Comments at 11; LHH Comments at 5; MATP Comments at 3; MPAA Comments at 16; NAD Comments at 10; NBC Comments at 10; NCTA Comments at 28, n. 58; SHHH Comments at 5; CAN Reply Comments at 5. As we discuss below, we agree that there is no requirement in the statute for captioning of programs that are not shown.

¹⁴¹ See, e.g., CBS Comments at 7; C-SPAN Comments at 9; DirecTV Comments at 10-11; E! Comments at 4; GSN Comments at 4-6; HBO Comments at 19; Lifetime Reply Comments at 3; NAB Comments at 11; NCTA Comments at 29; Outdoor Life Comments at 26; Primestar Comments at 10; Rainbow Reply Comments at 8-10; SBCA Comments at 11-12; TVFN Comments at 3, n. 3.

¹⁴² *Id.*

¹⁴³ A&E Comments at 22; ABC Comments at 10; CBS Comments at 7-8; C-SPAN Comments at 9; GSN Comments at 4-5; HBO Comments at 20; Lifetime Reply Comments at 4; Outdoor Life Comments at 26; Rainbow Reply Comments at 8.

¹⁴⁴ ABC Comments at 9; GSN Comments at 5; HBO Comments at 17; NAB Comments at 11; Primestar Comments at 10; Viewer's Choice Comments at 6; Rainbow Reply Comments at 10. In this instance, commenters (continued...)

consistent with the intent of the statute to refrain from imposing a mandatory captioning requirement on pre-rule materials, as Congress did not intend to deter providers from airing pre-rule programming due to the costs of captioning.¹⁴⁵ In contrast, VITAC maintains that statistics and anecdotal evidence strongly suggest that a significant number of widely distributed programs would never be voluntarily made accessible to the viewers who rely upon or use captions.¹⁴⁶ MPAA and Viacom recommend a requirement that, at most, 50% of the pre-rule programs that are actually aired be captioned, claiming that any higher percentage will result in a reduction of program variety.¹⁴⁷

54. Several commenters also express concern that a captioning requirement for pre-rule programs will unfairly burden networks dedicated to airing vintage material, and also new programming networks, which tend to rely more heavily on older materials in their early stages.¹⁴⁸ NCTA claims that new programming can be expected to have a "multi-year, multi-outlet life cycle" over which a provider can recover the costs of captioning, whereas older programming generally does not.¹⁴⁹ Some commenters also note that providers often acquired these programs without contemplating the cost of or need for adding captions at a later date, and that a captioning requirement for pre-rule programming would result in programs purchased or licensed prior to the advent of the captioning mandate being archived rather than aired, effectively causing a loss of funds spent to acquire such programs.¹⁵⁰

55. A number of commenters contend that there are now large amounts of previously captioned video material which are repeatedly transmitted without captions, and that we should first ensure that, regardless of editing or licensing of rights, once a program has been captioned for any venue, those captions will be reused even if slight reformatting is necessary.¹⁵¹ Several commenters would have program providers compile an inventory of all existing captioned programming, which would be submitted to the Commission shortly after the rules take effect.¹⁵²

¹⁴⁴(...continued)

are using the term "library" in the traditional industry sense, i.e., once a program is exhibited, it becomes a part of the programming library.

¹⁴⁵ C-SPAN Comments at 9; HBO Comments at 19; NAB Comments at 10; Outdoor Life Comments at 25-26.

¹⁴⁶ VITAC Comments at 2.

¹⁴⁷ MPAA Comments at 16; Viacom Reply Comments at 9.

¹⁴⁸ GSN Comments at 3; HBO Comments at 20; NAB Comments at 11-12; NCTA Comments at 28; Primestar Comments at 9.

¹⁴⁹ NCTA Comments at 28.

¹⁵⁰ ABC Comments at 9; ALTV Comments at 13-14; Encore Comments at 10-11; NCTA Comments at 28.

¹⁵¹ AIM Comments at 2; ALDA Comments at 4; CAN Comments at 10; Cassidy Comments at 3; MATP Comments at 3; NVRC Comments at 3; SHHH Comments at 5; WGBH Comments at 8.

¹⁵² ALDA Comments at 4; CAN Comments at 10; NVRC Comments at 3.

56. Commenters representing persons with hearing disabilities oppose our proposal for captioning pre-rule programs.¹⁵³ Several commenters urge us to require that all pre-rule programming be captioned.¹⁵⁴ ALDA and CAN contend that our proposal to limit any captioning requirement to 75% of pre-rule materials is arbitrary and unsupported by law.¹⁵⁵ NAD claims that both the statutory language and the legislative history make clear that our proposed 75% requirement is not what Congress intended,¹⁵⁶ while LHH contends that the 75% goal falls "far short" of what would be a reasonable requirement for pre-rule programming.¹⁵⁷ Others maintain that Section 713(b)(2) requires the maximization of captioning for pre-rule programming "except as provided in subsection (d)," and that our proposal to exempt 25% of that programming would not fall within any Section 713(d) exception.¹⁵⁸

57. One commenter with a hearing disability notes that older programming predominates the video offerings of many cable networks, and argues that an exemption for such programming will leave cable television largely inaccessible to persons with hearing disabilities.¹⁵⁹ NCD claims that, where a programmer offers few or no new programs, a captioning requirement for some pre-rule material potentially involves no greater cost than would be incurred by a station which airs mainly new material.¹⁶⁰ NCD asserts that Congress did not intend Section 713(b)(2) to create incentives for programmers to rely on older video materials as a means of avoiding our captioning requirements.¹⁶¹

58. Transition Schedule. APTS supports a captioning requirement for 75% of any pre-rule materials still in use after the initial eight or ten year transition period for captioning of new programming, within a subsequent eight year period.¹⁶² APTS contends that the initial phase in will allow stations to build collections of captioned materials, and the subsequent period will allow time to identify and caption pre-rule programming that will have recurrent use.¹⁶³ MPAA and Viacom suggest a 15 year transition

¹⁵³ See, e.g., AIM Comments at 2; Cassidy Comments at 3; Council of Organizational Representatives Reply Comments at 3-4; Cotter Comments at 1; Nova West Comments at 1.

¹⁵⁴ See, e.g., AIM Comments at 2; LHH Comments at 6; NAD Comments at 10-11; Nova West Comments at 1.

¹⁵⁵ ALDA Comments at 4; CAN Comments at 10.

¹⁵⁶ NAD Comments at 10; see also LHH Comments at 6.

¹⁵⁷ LHH Comments at 6.

¹⁵⁸ CAN Comments at 11; NAD Comments at 10.

¹⁵⁹ Jordan Comments at 2.

¹⁶⁰ NCD Comments at 7.

¹⁶¹ *Id.*

¹⁶² APTS Comments at 8.

¹⁶³ *Id.*

period for captioning pre-rule programs, with 10% increments every three years¹⁶⁴ and with compliance calculated as a percentage of annual hours delivered by the provider to consumers.¹⁶⁵ GSN requests that we adopt a lower percentage requirement, perhaps 25%, and allow 16 years for implementation.¹⁶⁶

59. Commenters representing persons with hearing disabilities propose time frames for pre-rule programming ranging from three to ten years.¹⁶⁷ Several commenters propose that such programs be captioned within the same time frame as new programs.¹⁶⁸ A few propose a seven year transition period,¹⁶⁹ while LHH urges a goal of captioning 100% of pre-rule nonexempt programming over ten years, with increasing 20% increments every two years.¹⁷⁰ Captivision similarly suggests that captioning for pre-rule programs could be addressed with a longer implementation period of ten years, or by captioning 75% of the movies or series that are shown most often.¹⁷¹

2. Discussion

60. Section 713 requires that we maximize the accessibility of video programming first published or exhibited prior to the effective date of our rules through the provision of closed captions. With respect to the definition of pre-rule programming, the statute refers exclusively to video programming which was "first published or exhibited prior to the effective date" of the rules promulgated in this *Report and Order*.¹⁷² Thus, a program either will or will not have been first published or exhibited prior to the effective date of our rules. We clarify that the relevant date of first exhibition or publication of a program is its first exhibition or publication, by any distribution method. Finally, although the standard setting process for closed captioning decoders for high definition and digital television receivers is well underway, final standards for such receivers do not yet exist, making it difficult for entities

¹⁶⁴ MPAA Comments at 16; Viacom Reply Comments at 9.

¹⁶⁵ MPAA Comments at 17; Viacom Reply Comments at 5-6.

¹⁶⁶ GSN Comments at 6.

¹⁶⁷ See, e.g., Cassidy Comments at 3 (caption all library programs within three to five years); The Coalition Comments at 5 (children's, educational and prime time programs captioned within five years, all other library programs within seven years, with larger programmers captioning sooner than smaller); LHH Comments at 6 (ten years).

¹⁶⁸ ALDA Comments at 4; CAN Comments at 10; California Comments at 2; NVRC Comments at 3. CAN, ALDA and NVRC all objected to the eight and ten year schedules for new programming proposed in the *Notice*, with ALDA and NVRC recommending a two to three year transition for such programming. See CAN Comments at 3; ALDA Comments at 2; NVRC Comments at 2.

¹⁶⁹ AIM Comments at 2 (seeks captioning of 75-80% of library programming within seven years); The Coalition Comments at 5; Council of Organizational Representatives Reply Comments at 4; NAD Comments at 10-11.

¹⁷⁰ LHH Comments at 6.

¹⁷¹ Captivision Comments at 4.

¹⁷² See 47 U.S.C. § 613(b)(2).

preparing to broadcast or transmit to such receivers to finally format closed caption content for these uses.¹⁷³ Accordingly, we believe it appropriate to also define material prepared for such transmission as "pre-rule" until such time as the necessary decoder standard rules have been adopted by the Commission and are effective.

61. Our rules establish a ten year transition period for captioning of pre-rule programming, and require that 75% of all pre-rule nonexempt programming delivered to consumers during the first quarter of 2008 and thereafter must be captioned.¹⁷⁴ The requirement for pre-rule nonexempt programming will only apply to such programming that is actually aired by distributors. As with new programming, compliance with the 75% requirement for pre-rule programming as of 2008 shall be measured channel-by-channel, averaged over each calendar quarter.¹⁷⁵

62. We believe that the legislative history, in conjunction with the statute's distinction between captioning requirements for pre-rule and new programming,¹⁷⁶ supports an interpretation of the statute that requires captioning of a lesser amount of pre-rule nonexempt programming than new programming over a longer transition period. The legislative history of the statute illustrates Congress' expectation that something less than all pre-rule programming would ultimately be captioned: "[T]he Committee expects that . . . preexisting programming will be captioned to the maximum extent possible, with the recognition that economic or logistical difficulties make it unrealistic to caption all previously produced programming."¹⁷⁷ In contrast, the legislative history states, with respect to new programming, "the Committee expects that most new programming will be closed captioned."¹⁷⁸ Thus, we believe that at this time we should not implement a rule that will require that all pre-rule programming be captioned. In addition, given the vast amount of such programming in existence, the limited captioning resources available to produce captions for all programming at present, and Congress' concern that pre-rule programs not be relegated to the archives due to the cost of captioning,¹⁷⁹ we believe that the longer, ten year transition period we adopt is the "appropriate schedule"¹⁸⁰ for captioning of pre-rule programming. We expect that allowing additional time to achieve the pre-rule captioning requirement will help to alleviate some of the initial strain on captioning resources which will be created by our rules, and will ensure a more orderly, efficient transition to maximized accessibility of pre-rule programming.

¹⁷³ See Home Box Office *ex parte* letter of July 21, 1997.

¹⁷⁴ "Pre-rule nonexempt programming" is defined as programming that was first published or exhibited for distribution prior January 1, 1998, and does not meet any of the exemptions from our rules.

¹⁷⁵ See para. 45 *supra*.

¹⁷⁶ 47 U.S.C. §§ 613(b)(1) and (2).

¹⁷⁷ House Report at 114.

¹⁷⁸ *Id.*

¹⁷⁹ See House Report at 114.

¹⁸⁰ Section 713(c) requires us to "include an appropriate schedule of deadlines for the provision of closed captioning" in our rules. 47 U.S.C. § 613(c).

63. We believe that this rule strikes the proper balance between the statutory obligation to increase the amount of programming accessible through captions, without reducing the amount of pre-rule programs aired, and the economic and logistical concerns raised by captioning large amounts of pre-existing programs. While we sought comment on leaving decisions regarding the captioning of pre-rule programming to the marketplace, we are concerned that, without any requirements, much of this programming may remain inaccessible.¹⁸¹ We note that many nonbroadcast networks and many broadcast stations not affiliated with major networks rely on significant amounts of older programming.¹⁸² Without captioning requirements for such programs, we believe the viewing choices of persons with hearing disabilities could be significantly diminished. Requiring that 75% of pre-rule nonexempt programming be captioned as of 2008 will provide a substantial increase in the accessibility of such programs, while allowing significant flexibility in achieving this goal.

64. We will not establish interim benchmarks for pre-rule programming at this time. Our presumption is that market forces will foster increased captioning of pre-rule programs over time, rather than leaving the bulk of such programming to be captioned at the end of the transition period. We expect all distributors to make reasonable efforts to incrementally increase the amount of captioned older programming they offer prior to the pre-rule captioning deadline. We will monitor distributors' efforts to increase the amount of captioning of pre-rule programs to determine whether channels are progressing toward the 75% requirement. If sufficient progress is not evident, we may institute specific percentage requirements for the remaining years of the transition period. We will also reevaluate the 75% requirement after four years to determine whether it is appropriate or whether a different percentage should be required. We recognize that the expansion of captioning resources and technological developments which may be made during the course of the transition period may lessen the costs and other difficulties involved with captioning pre-rule programs such that captioning a greater percentage of such programs will not pose a significant burden. By the same token, it might be that a 75% requirement is more burdensome than expected. By reviewing the status of captioning of pre-rule programming, we will be able to make adjustments to our rules, if warranted, to ensure that distributors are maximizing the accessibility of older video programming, while allowing significant flexibility in achieving this goal.

65. We expect that video programming providers will use the flexibility granted by the transition period to determine cost-effective and practical usage of captioning resources for pre-rule programming. We also expect that this flexibility will address commenters' claims that distributors can neither bargain for captioning to be included in the license, nor refuse to buy uncaptioned programming in the near term, due to standard, long-term film licensing contracts, which typically extend for several years.¹⁸³ A ten year transition period for captioning pre-rule programs will allow time for most existing contracts to expire and for distributors and owners to negotiate for an efficient provision of captioning in new and existing contracts.

66. With respect to commenters' suggestions that we create an inventory of pre-rule programming that has already been closed captioned, we recognize that such an inventory could assist distributors in meeting our captioning requirements, but we believe that the administrative burden of

¹⁸¹ See VITAC Comments at 2.

¹⁸² See, e.g., Jordan Comments at 2; NAD Reply Comments at 6-7.

¹⁸³ See, e.g., Encore Comments at 11.

establishing and maintaining such an inventory is not suited to the regulatory process. Producers and programmers that have made the effort to caption their video programs should know which of their programs have captions and which do not. We encourage programmers to create inventories of their captioned programs, and to make such information publicly available, including available to entities that license or purchase such programs.

V. MEASURING COMPLIANCE WITH THE RULES

A. Background

67. With respect to MVPDs, we sought comment as to whether the percentages of programming that must be captioned should be applied on a system-wide basis or to each program service or channel transmitted by an MVPD.¹⁸⁴ A few commenters support our proposal for a system-wide approach.¹⁸⁵ For example, DirecTV states that a system-wide application of the percentage requirements would make a market-driven allocation of closed captioning resources possible.¹⁸⁶ Encore claims that this approach will allow for minor variations among channels and differences in captioning burdens among the programs carried by different networks.¹⁸⁷ Primestar and HBO recommend that we allow MVPDs to elect either system-wide or per-channel compliance.¹⁸⁸

68. The majority of commenters who addressed this issue, however, support a channel-by-channel application, noting that this would be fairer and result in more closed captioning than our system-wide proposal.¹⁸⁹ For example, CBS and several others contend that under the system-based approach MVPDs could pressure one service to caption more programming so that others could caption little, if any, programming.¹⁹⁰ NCD submits that we should allow MVPDs some variation within the per-channel

¹⁸⁴ Notice, 12 FCC Rcd at 1066 ¶ 44.

¹⁸⁵ DirecTV Comments at 7; Encore Comments at 9; GTE Comments at 3-4.

¹⁸⁶ DirecTV Comments at 7.

¹⁸⁷ Encore Comments at 9.

¹⁸⁸ Primestar Comments at 6-8; HBO Reply Comments at 11-12. HBO initially supported a system-wide compliance scheme (*see* HBO Comments at 13-14), but states that the additional flexibility afforded by allowing MVPDs to choose will facilitate MVPDs' ability to assemble programming packages and tailor captioning arrangements to suit their customers' needs. HBO Reply Comments at 12.

¹⁸⁹ A&E Comments at 19; AIM Comments at 2; BellSouth Reply Comments at 11-12; California Comments at 4; Cassidy Comments at 3; CBS Comments at 10; CAN Comments at 4; C-SPAN Comments at 12; Lifetime Reply Comments at 5; NAD Comments at 6; NCD Comments at 6-7; NCI Reply Comments at 3; NVRC Comments at 3; Stavros Reply Comments at 2; TVFN Comments at 4; US West Comments at 14-15; VITAC Comments at 4-5; WGBH Comments at 5-6. *But see* Cassidy Comments at 2: a per channel application might result in cable operators being obligated to caption "must-carry" broadcast stations.

¹⁹⁰ CBS Comments at 10; *see also* ALDA Comments at 3; Cassidy Comments at 2; CAN Comments at 4; C-SPAN Comments at 12; NAD Comments at 6; NVRC Comments at 3; TVFN Comments at 4.

approach,¹⁹¹ but requests that we prohibit any practices that tend to restrict the viewing options of closed captioning users.¹⁹² We also solicited comment on how to determine closed captioning requirements for programming services using multiplexing to offer multiple programs simultaneously.¹⁹³ NAB states that since the captions are embedded in each individual program, the program will contain captions before the signal is multiplexed, and therefore captions can simply be passed through on the multiplexed channel.¹⁹⁴ SBC argues that any closed captioning offered on multiplexed channels should count toward a provider's captioning quota, if providers are held responsible for closed captioning compliance.¹⁹⁵ Captivision contends that, at a minimum, the passing through of existing closed captions for multiplexing should be mandatory.¹⁹⁶

69. We also sought comment on whether a determination that a percentage requirement has been met should be based on the amount of programming with closed captioning that has been shown over a month, a week, or some other period of time.¹⁹⁷ A few commenters with hearing disabilities maintain that distributors should be required to comply on a daily basis.¹⁹⁸ Supporters of weekly measurements note that most distributor's schedules are set up on a weekly basis,¹⁹⁹ and that data collection burdens could become too great if the time frame were longer than a week.²⁰⁰ Commenters advocating monthly measurements note that such a time frame is reasonable, will reduce the recordkeeping burden on distributors, and will allow programmers flexibility to determine where to best spend limited captioning dollars, at least in the initial compliance periods.²⁰¹ TVFN supports monthly measurements, but adds that the time frame should not be shorter than a week in any event.²⁰²

¹⁹¹ For example, NCD suggests that we allow an MVPD to count 20% captioning on one channel and 30% on another to "average out to 25% at end of year two." NCD Comments at 6-7.

¹⁹² *Id.* at 7.

¹⁹³ Notice, 12 FCC Rcd at 1067 ¶¶ 48-49.

¹⁹⁴ NAB Comments at 9-10.

¹⁹⁵ SBC Comments at 5.

¹⁹⁶ Captivision Comments at 4.

¹⁹⁷ Notice, 12 FCC Rcd at 1067 ¶ 45.

¹⁹⁸ See, e.g., AIM Comments at 2; Kaleidoscope Comments at 4.

¹⁹⁹ ALDA Comments at 4; NAD Comments at 6; WGBH Comments at 6.

²⁰⁰ VITAC Comments at 5.

²⁰¹ California Comments at 4-5; Cassidy Comments at 3; Captivision Comments at 3; Encore Comments at 10; Stavros Reply Comments at 2; TVFN Comments at 3.

²⁰² TVFN Comments at 3-4.

70. Some commenters recommend quarterly measurements.²⁰³ Lifetime, for example, supports this approach and states that compliance measurements on a quarterly basis will permit optimum flexibility for packaging of programming especially during featured periods (e.g., special events months).²⁰⁴ A few others propose annual compliance measurements.²⁰⁵ MPAA contends that annual measurements are appropriate because the volume of new programs aired varies according to the program season.²⁰⁶ According to MPAA, measuring compliance on a weekly or monthly basis would not take seasonal variances into account, and would provide an incomplete or inaccurate assessment of closed captioning efforts, whereas measuring compliance annually would give programmers needed flexibility in scheduling.²⁰⁷ Similarly, ABC recommends annual review because it will give providers flexibility during the phase-in period to select those programs best suited for closed captioning and will encourage the most efficient use of resources for captions.²⁰⁸

71. We requested comment on whether compliance with our rules should be the responsibility of the MVPD or broadcaster where a broadcast station is retransmitted by an MVPD.²⁰⁹ Producers and distributors are concerned about the apportionment of responsibility for closed captioning of broadcast programs that are retransmitted by MVPDs. In such instances, CBS contends that the broadcast station's obligation to the MVPD should not go beyond the station's ordinary closed captioning responsibilities under the rules.²¹⁰ On the other hand, SBC maintains that broadcast stations should bear exclusive responsibility for captioning their programming, if distributors are held responsible for captioning generally.²¹¹ Persons with hearing disabilities generally oppose a rule which would allow MVPDs to count broadcast captioning towards their percentage requirements.²¹² As CAN contends, such a rule would allow some distributors to make no increase in closed captioning for several years.²¹³

²⁰³ Para Comments at 4; Lifetime Reply Comments at 5-6.

²⁰⁴ Lifetime Reply Comments at 5-6.

²⁰⁵ ABC Comments at 7-8; MPAA Comments at 10-11; Paxson Reply Comments at 4; Primestar Comments at 8.

²⁰⁶ MPAA Comments at 11.

²⁰⁷ *Id.*

²⁰⁸ ABC Comments at 7-8.

²⁰⁹ Notice, 12 FCC Rcd at 1066 ¶ 44.

²¹⁰ CBS Comments at 11.

²¹¹ SBC Comments at 5; *see also* AEC Reply Comments at 2-3.

²¹² *See, e.g.,* California Comments at 4; Cassidy Comments at 2; CAN Comments at 4; NAD Comments at 6.

²¹³ CAN Comments at 4. CAN and Sonny Access also propose that deaf and hard of hearing viewers receive a discount on their cable bills tied to the amount of uncaptioned programming offered by the distributor. Sonny Access seeks the discount only for the transition period, while CAN supports a discount during and after the transition. CAN Reply Comments at 4; Sonny Access Reply Comments at 3.

72. HBO requests clarification that any non-English language program captioning requirement ultimately adopted does not extend to services which offer a second language soundtrack, as this would require a single program to be captioned twice, doubling the cost of captioning.²¹⁴ HBO also seeks clarification that non-English language programming which already contains English subtitles need not be captioned, and that discrete portions of programs which contain non-English dialogue (e.g., an English language war film that includes scenes where foreign soldiers speak in another language without translation) need not be captioned.²¹⁵

73. In the *Notice*, we tentatively concluded that it would not be appropriate or necessary to restrict captioning methodologies.²¹⁶ We were concerned that any restrictions on the method of captioning would prevent certain types of programming from being captioned. For example, we noted that the ENR method does not provide complete captioning when not all aural portions of a program are scripted, yet it has the advantage over other methods in that once an initial investment is made in equipment and software, it is relatively cost free.²¹⁷

74. Comments on this issue focus on whether the ENR method of captioning should be acceptable for compliance with our rules. Parties supporting our proposal not to restrict the use of this method generally state that its use will permit the captioning of certain types of programming, especially local news and other live programs, that otherwise would not be captioned in the short term.²¹⁸ RTNDA claims that the ENR method of captioning can yield highly reliable captions for the majority of live, local news content at modest cost.²¹⁹ In this regard, Pulitzer asserts that the content of the limited amount of non-scripted material is often communicated in other ways (e.g., weather reports that contain graphical and visual elements).²²⁰ WGBH states that, if carefully and intelligently prepared, ENR captioning can provide access to large portions of news programs.²²¹ In this regard, WGBH states that we should indicate that users of the ENR method need to enter additional script transcriptions into their systems. It suggests that we require that a percentage of a program (e.g., 50% or 75%) be accessible through captions if ENR

²¹⁴ HBO Comments at 23.

²¹⁵ *Id.* at 24.

²¹⁶ *Notice*, 12 FCC Rcd at 1093 ¶ 121.

²¹⁷ *See Notice*, 12 FCC Rcd at 1058 ¶ 21.

²¹⁸ ABC Comments at 17-18; NCTA Comments at 33; NAB Comments at 17; RTNDA Comments at 3, 8-11. Para Technologies proposes an alternative method it calls "simplistic captioning," which would provide captioning of the essential portions of the program and that could be done by a typist rather than a stenocaptioner. Para Technologies Comments at 5, 9-10.

²¹⁹ RTNDA Reply Comments at 5.

²²⁰ Pulitzer Comments at 6; RTNDA Reply Comments at 6.

²²¹ WGBH Comments at 16.

is used.²²² Similarly, MCS states that a program should not count towards compliance if more than 20% is not captioned.²²³

75. Several commenters are concerned about the cost of real-time captioning should it be mandated for their live programming. For example, RTNDA claims that a requirement for real-time captioning could add at least \$100,000 to a station's annual budget.²²⁴ Time Warner estimates that the cost of stenocaptioning its 24-hour local news service would be \$500,000 a year.²²⁵ Allnewsco indicates that its ENR system cost \$100,000 and that a requirement to use real-time captioning would double the per hour cost of its programming.²²⁶ These commenters assert that the costs of mandated real-time captioning would likely result in the reduction or elimination of the local news services they offer.²²⁷ In addition, commenters indicate that, if ENR is declared inadequate, it is not certain that all programs currently captioned would remain captioned, and a loss of accessibility might result.²²⁸

76. Alternatively, NAD, Captivision, and Cassidy maintain that the use of the ENR method is not sufficient to satisfy the intent of Section 713 to make video programming "fully accessible."²²⁹ They contend that ENR does not satisfy full accessibility since it does not provide captions for many elements of a news program²³⁰ and, therefore, is not the functional equivalent of the audio portion of the program.²³¹ NAD rejects any proposals to find the use of ENR acceptable, including those proposals to permit the use of ENR if a specified percentage of the programming is captioned using this method.²³² While noting our concern about the availability of a sufficient number of stenocaptioners, NAD argues that, as captioning becomes required, the number of captioners will increase to fill the need. On this basis, NAD and a few

²²² *Id.*

²²³ MCS Comments at 16.

²²⁴ RTNDA Comments at 9.

²²⁵ Time Warner Comments at 7.

²²⁶ Allnewsco Reply Comments at 3-4. Allnewsco states that our estimate that the installation of ENR costs no more than \$5000 is just for the purchase of the caption encoder and script translation software and assumes that the programmer has already installed a basic electronic newsroom system. *Id.* at 3.

²²⁷ Allnewsco Reply Comments at 4; RTNDA Comments at 9; Time Warner Comments at 7.

²²⁸ ABC Comments at 16-17; NAB Comments at 17.

²²⁹ NAD Comments at 27; Captivision Comments at 11; Cassidy Comments at 4.

²³⁰ *Id.*

²³¹ NAD Reply Comments at 13.

²³² NAD states that this would be the equivalent of permitting a percentage of the audio content to be missing. NAD Reply Comments at 13 n.13.

other commenters state that any rule which permits ENR captioning should be limited to one or two years at most.²³³

77. We further proposed that a distributor that receives a program with captions, and does not edit that program, be required to deliver that programming with captions, regardless of whether the distributor has already met any percentage requirement.²³⁴ Most commenters that address this issue agree with this proposal.²³⁵ We also sought comment on whether distributors that edit pre-recorded captioned programming should be required to reformat the captions of such programming.²³⁶ Many commenters support a requirement that previously captioned programming be reformatted if necessary, citing the relatively low cost of reformatting.²³⁷ NAD opines that a rule for previously captioned programming that does not encompass reformatting will not significantly improve access.²³⁸ LHH contends that distributors accept certain costs of editing to add commercials, and that reformatting should be viewed as part of those costs.²³⁹

78. In contrast, NAB states that a requirement that previously captioned programs be transmitted with captions is unnecessary, because this is current practice for programming that is not edited prior to airing.²⁴⁰ However, NAB argues that it would be unreasonable to expect broadcasters that receive programs with captions that are damaged or in need of reformatting to bear the burden of repairing or reformatting those captions. According to NAB, this would require broadcasters to screen every program that is delivered to the station, determine what the original text of the captions was and how it was formatted, and then repair or reformat the captions.²⁴¹ MPAA and CBS also oppose a rule which would require previously-captioned material to be reformatted.²⁴² CBS contends that the costs of reformatting

²³³ NAD Comments at 27; Council of Organizational Representatives at 11.

²³⁴ Notice, 12 FCC Rcd at 1067 ¶ 47.

²³⁵ See, e.g., AIM Comments at 2; California Comments at 5; Cassidy Comments at 3; Captivision Comments at 3; CBS Comments at 11; LHH Comments at 4; MATP Comments at 3; NAD Comments at 7; NCI Comments at 8; WGBH Comments at 7.

²³⁶ Notice, 12 FCC Rcd at 1067 ¶ 47.

²³⁷ AIM Comments at 2; California Comments at 5; Captivision Comments at 3; Cassidy Comments at 3; LHH Comments at 4-5; NAD Comments at 7; NCI Comments at 8; Stavros Reply Comments at 3; WGBH Comments at 7.

²³⁸ NAD Comments at 7-8.

²³⁹ LHH Comments at 5.

²⁴⁰ NAB Comments at 8.

²⁴¹ *Id.*

²⁴² MPAA Comments at 12; CBS Comments at 11.

are substantial and should not be imposed on a distributor that is already meeting its obligations.²⁴³ MPA claims that such a rule would impose unnecessary costs and discourage distributors from editing programs to add local content or meet other local requirements.²⁴⁴

B. Discussion

79. Compliance with our closed captioning requirements will be measured on a channel-by-channel basis. Measurement of compliance on a channel-by-channel basis was supported by the majority of commenters on this issue. We are persuaded that the system-wide approach proposed in the *Notice* would allow MVPDs to require some services to offer more captioning to balance out services that offer little or no captioning. In addition, MVPDs might be required to monitor the amount of captioning on each channel they carry and then determine whether they meet an overall system average. Moreover, by measuring compliance on a channel-by-channel basis, a network will be able to set budgets and hire staff based on the requirements applicable for its own programming, without having to factor in the efforts of others. Thus, we conclude that a system-wide approach would prove administratively burdensome for video programming distributors. Furthermore, we do not believe that a system-based approach is consistent with the goal of ensuring captioning of diverse programming services. We believe that it is important to increase the availability of closed captioning on each channel of video programming over the transition period to provide persons with hearing disabilities a wide range of programming choices.

80. We believe that holding video programming distributors responsible for captioning, and measuring compliance with our rules on a channel-by-channel basis, adequately address commenters' concerns regarding captioning responsibility for broadcast stations retransmitted by MVPDs. Broadcast stations will be responsible for ensuring their compliance with our rules in their role as video programming distributors. Broadcasters will caption to meet their requirements, and MVPDs will be required to pass through those captions intact. Also, in view of our channel-by-channel compliance requirement, each channel of a multiplexed signal will be obligated to meet the minimum requirements of our rules.²⁴⁵ We recognize, however, that in some situations, such as where a "video on demand" type of service is in operation or the content of a channel is otherwise dependent on specific subscriber requests, it may be difficult, if not impossible, to schedule programming with the advance knowledge that it will meet the applicable standards. In such situations, we will only require that a reasonable judgment be made in advance as to the likely output of the channel, with captioning provided based on this estimate. To the extent necessary, Commission guidance also may be sought in advance regarding the appropriate methodology for determining this estimate and for compliance with our captioning requirements.

²⁴³ CBS Comments at 11 and n. 23, citing the *Notice*, 12 FCC Rcd at 1058, ¶ 22 regarding the costs of reformatting.

²⁴⁴ MPAA Comments at 12.

²⁴⁵ This will occur as a matter of course to some extent, as captioning is embedded into individual programs and is in place before the signal is multiplexed.

81. Compliance with our rules will be measured on a quarterly basis.²⁴⁶ We believe that a calendar quarter for measuring compliance with our closed captioning rules provides a reasonable balance among the various alternative time periods suggested, especially during the transition period. Commenters indicate that programmers often set aside weeks or months for special programming. Thus, by measuring compliance over a calendar quarter, programmers will have the flexibility to incorporate specials and thematic programming into their schedules while still meeting our closed captioning benchmarks. Shorter compliance periods would hinder such flexibility and could prove administratively burdensome. Periods such as a day or a week also may not take into account normal scheduling differences. For example, program schedules often differ between weekdays and weekends. Similarly, there may be unusual weeks of scheduling, such as a local sports tournament or elections. We believe that a programmer should have the flexibility to consider the nature of these programming differences when determining how best to meet the captioning requirements. We also reject longer measurement periods, such as six months or a year. We are concerned that these longer periods for measuring compliance would make it more difficult to enforce the rules during the transition period and after our permanent captioning requirements take effect. In particular, it would take months for complaints to be resolved since a period of up to a year may have to elapse before we will be able to determine whether an alleged violation has occurred.

82. We establish a number of additional rules with respect to the measurement of compliance. For determining the hours of programming with captioning, a video programming distributor may consider a program to be the length of the time period for which it is scheduled. We will permit video programming distributors to count any new exempt programming that is captioned towards their requirements, except that which is distributed during late night hours during the eight year transition period.²⁴⁷ During the transition period, distributors may not count any pre-rule captioned programming toward the new programming benchmark.²⁴⁸ Any captioned pre-rule exempt programming may be counted towards the requirements for pre-rule programming after they become effective in 2008.²⁴⁹ In addition, when video programming is no longer exempt, then it becomes subject to the rules applicable to all programming.²⁵⁰ Moreover, we recognize that MVPDs sometimes combine portions of different full-time programming networks and services to create one channel that is distributed to viewers. Where a video programming distributor combines the programming of two or more programming networks (or other sources of programming) to create a single channel, that channel will be considered to be in compliance if each of the programming sources is in compliance where it is carried on a full time basis. That is, each

²⁴⁶ We have specified our closed captioning benchmarks in terms of the number of hours of video programming that must be captioned, measured over a calendar quarter.

²⁴⁷ We will consider whether we should extend this past the transition period and whether such extension would be consistent with the statute.

²⁴⁸ This will not be relevant after the transition period since 95% of all nonexempt new programming will be required to be captioned.

²⁴⁹ After the end of the transition period for pre-rule programming, 75% of all covered pre-rule programming will be required to be captioned in addition to all covered new programming.

²⁵⁰ For example, a new network will become subject to the rules four years after it begins operation and is no longer exempt.

network carried on a shared basis will be deemed in compliance based on its programming and not just the hours selected by the distributor for its shared channel.

83. We also will permit video programmers to count towards compliance with our rules any program that is open, rather than closed captioned. Open captioning provides the same information as closed captions but includes this information as part of the primary video signal instead of carrying the captions on line 21 of the VBI. Thus, the information is available to all viewers without decoding. Because this technique ensures the same accessibility as closed captioning, we will permit video programming providers and distributors to use open captioning. Similarly, we permit subtitles that are available to all viewers to count towards compliance if they are in the language of the target audience. While we recognize that subtitles may provide only the dialogue of a program visually, and not some of the other audio portions of the programming, we believe that they can make programming that might not otherwise be accessible available to persons with hearing disabilities. In addition, where a program includes a second language soundtrack on its secondary audio programming ("SAP") signal, the second audio signal need not be captioned. We also conclude that discrete portions of programs which contain non-English dialogue, such as where characters in an English language film speak in another language without translation, need not be captioned.

84. We will not adopt any limits on the methodology that can be used to create closed captioning and will permit the use of ENR.²⁵¹ We may alter this policy in the future, but, at this time, it appears reasonable to permit its use.²⁵² We are concerned that certain portions of live newscasts often remain uncaptioned even with the use of ENR because they are not scripted, and as commenters representing persons with hearing disabilities point out this method is not the functional equivalent of the audio portion of the programming.²⁵³ However, the record before us provides conflicting evidence regarding the number of real-time captioners for programming, primarily live newscasts, for which ENR is an alternative method. For example, MATP reports that there are 542 court reporters certified as real-time stenocaptioners and hundreds more registered with real-time captioning skills,²⁵⁴ yet VITAC, one of the larger captioning agencies, states that there is a shortage of qualified stenocaptioners for real-time captioning.²⁵⁵ However, we recognize that an enormous amount of programming that has not been captioned up until this time will soon have to be captioned. We believe that the interests of persons with hearing disabilities and the video industry are served by permitting the use of ENR at this time. We conclude that ENR will permit such programming to be made accessible under the transition schedule we

²⁵¹ We will also permit the use of automated software that creates a continuous captioned message to be used for the live portions of noncommercial broadcaster' fundraising activities.

²⁵² See discussion of local emergencies, paras. 252-253 *infra*.

²⁵³ See, e.g., NAD Reply Comments at 13.

²⁵⁴ MATP Comments at 2 n.1. See also NAD Reply Comments at 13, n.14.

²⁵⁵ VITAC Comments at 6. According to VITAC, of 100 students who enter court reporting school in fall 1997, no more than two will become captioners and they will not be ready to apply their skills until fall 2000 at the earliest. VITAC Comments at 8. See also E! Comments at 3; WGBH Comments at 16.

adopt at a reasonable cost.²⁵⁶ Accordingly, consistent with Section 713, our decision to permit ENR will promote accessibility without imposing a captioning requirement that is an economic or undue burden.²⁵⁷ We also hope that once an entity invests in the software needed to convert a teleprompter script into captions, it will have an incentive to use this equipment for all or a significant portion of its live programming (e.g., all its newscasts), and not just the amount of programming needed to satisfy the transition benchmarks. Thus, additional programming may be made accessible at a faster rate. We expect to revisit this issue in the future to evaluate whether ENR provides sufficient captioning of news programming that is of such importance to persons with hearing disabilities.²⁵⁸ In the meantime, we urge video programming providers to script additional portions of their programming, especially weather and sports reports. We also believe that, if ENR is used, an introduction to or short description of the non-captioned segment (e.g., live remote) should be provided to allow persons with hearing disabilities to be aware of the topic of the story. We believe that it may be appropriate to reconsider the use of ENR as a means of captioning once the cost of real-time captioning declines, the availability of captioners increases, and the technology to provide live captioning from remote locations becomes more readily available.

85. In addition, we will require distributors to pass through existing captions where the programming they distribute is received with captions, regardless of whether the distributor has already met the relevant captioning benchmark. This requirement will apply to both new and pre-rule programming when distributors deliver programming to consumers without editing. This requirement will not impose a burden on distributors, as all distributors have the technical ability to pass through captioning and it simply requires them to ensure that their technical facilities are in proper working order to pass through the captioning data. Thus, all video programming distributors will be required to deliver all programming they receive that contains closed captioning, regardless of the programming source, to consumers with the captions intact.

86. We recognize that persons with hearing disabilities find it frustrating when a program previously viewed with captions is shown at another time without captions. In some instances, the reason for this is that the program has been edited, which may require that the captions be reformatted. We recognize that reformatting involves some expense and effort in order to ensure that the captions correspond to the edited program. We believe that the reformatting of captions when programming is edited is an important part of providing access to video programming consistent with the intent of Section 713. Thus, we expect that video programming providers will make the reformatting of captions a common practice when programs are edited. However, we are aware that a requirement, in addition to the other requirements of our rules, that every program that has previously been captioned have its captions reformatted before it is redistributed to consumers could be economically burdensome in some cases because of the type or amount of editing that is done. Accordingly, we will not at this time adopt a requirement for reformatting, although we strongly encourage video programming providers to reformat

²⁵⁶ Based on our estimates of the cost of real-time captioning that range from \$120 to \$1200 an hour, the cost of captioning one hour of programming daily would add between \$43,000 and \$438,000 annually to an entity's costs. This is considerably higher than the cost of installing ENR capability, which is estimated to be between \$2500 and \$5000. See *Report*, 11 FCC Rcd at 19235 ¶ 51.

²⁵⁷ Sections 713(d)(1) and (d)(3).

²⁵⁸ See, e.g., Cassidy Comments at 4; NAD Comments at 27; NAD Reply Comments at 13.

captions as part of the editing process.²⁵⁹ We also anticipate that more reformatting of captions will be done as the marketplace evolves, video programming providers become more accustomed to captioning their programming and technological changes make reformatting easier, less expensive and less onerous. We intend to review this decision as our closed captioning rules are implemented to determine whether our expectation that reformatting will become an industry practice is fulfilled. At that time, we will consider whether a reformatting requirement is necessary.

VI. EXEMPTIONS FROM THE CLOSED CAPTIONING RULES

A. Exemptions Based on "Economically Burdensome" Standard

1. Background

a. Exempt Classes of Programming

87. The statute allows the Commission to "exempt by regulation programs, classes of programs, or services" for which the Commission determines that "the provision of closed captioning would be economically burdensome."²⁶⁰ We sought to establish a number of general classifications of programming that would be exempt from our requirements because captioning would be economically burdensome.²⁶¹ We requested detailed comments regarding the appropriate class exemptions that would be consistent with the statutory mandate to make video programming fully accessible to individuals with hearing disabilities. In particular, we sought comment on whether a definition of economic burden should be based on factors such as relative market size, degree of distribution, audience ratings or share, relative programming budgets or revenue base, lack of repeat value, or a combination of factors.²⁶² We also requested comment on whether specific types of programming should be encompassed by our general class exemptions.

88. Commenters representing persons with hearing disabilities and captioners generally argue that any class exemptions we adopt should be narrowly drawn, with some commenters recommending that there be virtually no general exemptions.²⁶³ SHHH and NCI ask that any class exemptions we adopt be subject to review within two years, arguing that Congress did not intend to exempt certain types of new

²⁵⁹ We note that the cost of reformatting is estimated to be about one fourth the cost of the initial captioning. *Report*, 11 FCC Rcd at 19233-19234 ¶ 49.

²⁶⁰ 47 U.S.C. § 613(d)(1).

²⁶¹ *Notice*, 12 FCC Rcd at 1075 ¶ 71.

²⁶² *Id.*

²⁶³ *See, e.g.*, AIM Comments at 3; NCI Comments at 10-11; AAAD Comments at 3 (programming which requires audio to be understood should be captioned without exception); California at 5 ("There should be no type of program that is exempt from captioning"); Captivision Comments at 6 (there should not be a class exemption for programming; where there is a broadcast station there are court reporters). *But see* NIMA Reply Comments at 2-3 (statutory authority to exempt classes of programs is clear; failure to exercise that authority will result in waste of Commission resources -- exemptions for situations which are common to multiple programmers would have to be handled on an individual, case-by-case basis under the undue burden standard).

programming forever.²⁶⁴ Captivision contends that general exemptions should not apply wherever a program has high public interest value and would affect "the deaf community's interaction with their environment."²⁶⁵ NCI argues that we should address exemption requests by adopting longer implementation periods for the types of programming for which exemptions are sought.²⁶⁶ CAN asserts that exemptions should be conditioned on the use of textual and graphic summaries, to the maximum extent reasonable.²⁶⁷

89. AIM maintains that budget size should be a factor for determining exemptions,²⁶⁸ while Captivision states that factors such as market size, degree of distribution, audience, ratings or share are irrelevant to Congress' intent of full accessibility.²⁶⁹ USSB contends that, in crafting exemptions to our closed captioning rules, we should consider all the factors enumerated in the *Notice*,²⁷⁰ as well as the nature and cost of providing captions and the impact of captioning upon the operations of providers, owners and programmers.²⁷¹ Another commenter urges that, as with the Americans with Disabilities Act ("ADA"),²⁷² consideration for exemptions should take into account the revenue base of a programmer's parent company.²⁷³

90. Commenters define a few classes of programming that should be exempt or criteria for determining whether a captioning requirement would be economically burdensome. Principally, however, commenters addressed specific types of programming, particular programming services, and classes of providers and whether they should be exempt under this standard. We first describe the class exemptions proposed by commenters, including new programming networks,²⁷⁴ overnight programming,²⁷⁵ local

²⁶⁴ SHHH Comments at 5-6; NCI Reply Comments at 3..

²⁶⁵ Captivision Comments at 6.

²⁶⁶ NCI Reply Comments at 2-3.

²⁶⁷ CAN Reply Comments at 6.

²⁶⁸ AIM Comments at 3.

²⁶⁹ Captivision Comments at 6.

²⁷⁰ 12 FCC Rcd at 1075 ¶ 71.

²⁷¹ USSB Comments at 10-11.

²⁷² 42 U.S.C. §§ 12101 *et seq.*

²⁷³ Cassidy Comments at 3.

²⁷⁴ See, e.g., A&E Comments at 23; C-SPAN Comments at 10; NCTA Comments at 19-20; Outdoor Life Comments at 33-39.

²⁷⁵ ABC Comments at 13-14; C-SPAN Comments at 11-12; NAB Comments at 17; NBC Comments at 10; NCTA Comments at 20; USSB Comments at 10.

origination programming,²⁷⁶ certain locally produced public television programming,²⁷⁷ non-profit programmers,²⁷⁸ and programming for which captioning costs would represent 10% or more of the production budget.²⁷⁹ Next we discuss the comments regarding specific types of programming that were enumerated in the *Notice*.²⁸⁰ Then, we present the comments of BIT, QVC, the Weather Channel, GSN, and Prevue that seek waivers as individual services. Finally, we describe the comments regarding exemptions for classes of providers, such as ITFS licensees, wireless cable operators using ITFS frequencies, LPTV stations, and cable systems.

91. New Networks. Numerous commenters recommend an exemption, at least initially, for programming offered by new programming networks, arguing that the economic burden of captioning could mean the difference between success and failure of a new network.²⁸¹ Such an exemption, Viacom contends, is consistent with Congress' objective of eliminating market entry barriers for small entities.²⁸² Commenters assert that launching a new network can cost \$100 million or more,²⁸³ and that it generally takes at least five years for new networks to reach the break even point.²⁸⁴ Outdoor Life maintains that affiliation fees and advertising revenues, which are the main sources of cash flow for programming networks, are limited for new networks initially because many multiple system operators ("MSOs") demand one or more years of free programming service in exchange for carriage on a cable system, and major advertisers are unwilling to place advertisements on new networks until they reach a threshold subscriber base of 15 to 20 million subscribers.²⁸⁵ A few of these commenters ask that we exempt new networks from our captioning requirements for at least the first five years from their launch dates,²⁸⁶ and

²⁷⁶ See, e.g., NCTA Comments at 23-24.

²⁷⁷ APTS Comments at 11-12.

²⁷⁸ See, e.g., California Channel Reply Comments at 2 and 6; EWTN Reply Comments at 6-9.

²⁷⁹ Kaleidoscope Comments at 7.

²⁸⁰ *Notice*, 12 FCC Rcd at 1076-80 ¶¶ 72-84.

²⁸¹ Allnewsco Reply Comments at 5; AlphaStar Comments at 9-10; BIT Reply Comments at 7-8; C-SPAN Comments at 10; Lifetime Reply Comments at 4-5; NCTA Comments at 20; Outdoor Life Comments at 33; Rainbow Reply Comments at 3-8; Viacom Reply Comments at 12-15. Paxson seeks a similar exemption for new broadcast networks. Paxson Reply Comments at 5.

²⁸² Viacom Reply Comments at 13-14, citing our reference to § 257 of the 1996 Act (at 12 FCC Rcd 1080, n. 165).

²⁸³ NCTA Comments at 19; Outdoor Life Comments at 10; Paxson Reply Comments at 5.

²⁸⁴ A&E Comments at 23; NCTA Comments at 19; Outdoor Life Comments at 11; Viacom Reply Comments at 12-13.

²⁸⁵ Outdoor Life Comments at 11-13.

²⁸⁶ A&E Comments at 23, C-SPAN Comments at 10; Lifetime Reply Comments at 4; NCTA Comments at 20; Viacom Reply Comments at 14.

thereafter allow these networks the same amount of time to phase in captioning of new programming that established networks are granted under our rules.²⁸⁷ Several parties urge us to exempt networks that have limited subscriber bases from captioning requirements even after their first five years.²⁸⁸ These parties argue that a network should be exempt from our requirements until it reaches a minimum number of subscribers, with the suggested subscriber thresholds ranging from 15 to 50 million.²⁸⁹ In support of this proposal, Outdoor Life notes that exempting low-penetrated networks will affect programming that is provided to only 17% of the collective number of subscribers to all national, basic, nonbroadcast networks.²⁹⁰ Additionally, it proposes that a network that reaches the 20 million mark but later falls below it would not revert to exempt status. Rather, such a network would be required to seek an exemption from captioning requirements under the undue burden procedure.²⁹¹

92. Late Night Programming. A number of programmers seek a class exemption for overnight news feed services that are distributed during the late night or early morning hours. These programs are typically compiled from a variety of sources, and consist of unscripted, uncaptioned materials edited together and redistributed to network affiliates around the country.²⁹² Commenters contend that such compilations would require real-time captioning, the cost of which is not warranted for programming aired late at night when viewership and advertising revenues are low, and where the programming has no residual market value.²⁹³ Others request an exemption for all late night programming, citing the low viewership, license fees and advertising revenues generated by programs aired between 2:00 a.m. and 6:00 a.m. and the limited resources available for captioning of all programs as support for such an exemption.²⁹⁴

93. Local Origination Programming. Some commenters suggest that local origination programming should be exempt from our captioning rules because it serves significant community public interests, but operates on extremely low budgets.²⁹⁵ According to commenters, much of this programming

²⁸⁷ C-SPAN Comments at 10; Lifetime Reply Comments at 4-5; NCTA Comments at 20; Viacom Reply Comments at 14. *See also* Allnewsco Reply Comments at 5 (seeking flat eight-year exemption for new networks).

²⁸⁸ BIT Reply Comments at 7-8; NCTA Comments at 20; Paxson Reply Comments at 5 (seeks exemption of new broadcast networks until the network reaches an unidentified threshold of affiliates); Alphastar Comments at 9; C-SPAN Comments at 10; Outdoor Life Comments at 33.

²⁸⁹ *See, e.g.,* Alphastar Comments at 9 (30 to 50 million subscribers); C-SPAN Comments at 10 (15 million subscribers); Outdoor Life Comments at 33 (20 million subscribers).

²⁹⁰ Outdoor Life Comments at 34.

²⁹¹ *Id.* at 36, n. 42.

²⁹² *See, e.g.,* NBC Comments at 7; RTNDA Reply Comments at 8.

²⁹³ *See, e.g.,* ABC Comments at 13; NAB Comments at 17; NBC Comments at 10; USSB Comments at 10.

²⁹⁴ C-SPAN Comments at 11; NCTA Comments at 20-21; Paxson Reply Comments at 7.

²⁹⁵ BellSouth Reply Comments at 17; NCTA Comments at 23-24; PCN Reply Comments at 2-3; SCBA Reply Comments at 11-12; Time Warner Comments at 9-10; US West Comments at 3-5. Local origination programming (continued...)

consists of unscripted, live programs such as talk shows, local sporting and charity events, and public affairs programming, which would be very expensive to caption.²⁹⁶ US West and SCBA note the similarities between local origination and PEG access programming, which we tentatively proposed to exempt.²⁹⁷ Time Warner and CBA contend that our rules should balance the need for captioning against the risk of suppressing this type of programming.²⁹⁸

94. Noncommercial Programming. APTS requests an exemption for all local programs produced by small noncommercial television stations and for all locally produced programs offered to the Program Exchange Service.²⁹⁹ APTS defines small noncommercial stations as those that operate with annual budgets of less than three million dollars.³⁰⁰ APTS claims that both non-commercial programs and programming produced locally and distributed through the Program Exchange Service have minimal budgets, and that a captioning requirement for these programs will cause stations to stop producing them, as captioning costs will significantly increase the costs of production for such programming.³⁰¹ Similarly, APS proposes a general exemption for public broadcasters, citing funding concerns for all public broadcast stations and programming.³⁰² USSB seeks an exemption for the noncommercial educational and informational programming DBS providers will be required to provide under Section 335(b)(1) of the Communications Act,³⁰³ claiming that these programs typically operate on relatively small budgets and captioning is likely to place a heavy burden on the producers of such programs.³⁰⁴

95. Nonprofit Networks. A few commenters propose that we exempt nonprofit program networks from our captioning requirements.³⁰⁵ EWTN seeks an exemption for all nonprofit networks as a class, noting that Congress specifically enumerated nonprofit status as a factor we should consider in

²⁹⁵(...continued)

is community-based and produced programming that is offered voluntarily by cable operators. It generally offers unique, diverse programming of local interest. *See, e.g.,* Time Warner Comments at 3; US West Comments, *id.*

²⁹⁶ *See, e.g.,* NCTA Comments at 23, PCN Reply Comments at 2-3.

²⁹⁷ US West Comments at 3-5; SCBA Reply Comments at 11-12.

²⁹⁸ CBA Comments at 1; Time Warner Comments at 10.

²⁹⁹ APTS Comments at 11-12. Local shows are offered to the Program Exchange Service for free distribution to and use by other Exchange Service participants. *Id.* at 12.

³⁰⁰ *Id.* at 11. APTS asserts that the \$3,000,000 figure is generally accepted among non-commercial stations as indicative of a small station. *Id.*, at n. 16.

³⁰¹ *Id.* at 11-12.

³⁰² APS Comments at 16.

³⁰³ 47 U.S.C. § 335(b)(1).

³⁰⁴ USSB Reply Comments at 5.

³⁰⁵ *See, e.g.,* California Channel Reply Comments at 6-8; EWTN Reply Comments at 6-8.

crafting our exemptions.³⁰⁶ In the alternative, EWTN seeks a six-year exemption for all nonprofit networks that have not broken even in any one of the five years preceding the effective date of our rules, or for which captioning costs are estimated to exceed 25% of the programming budget in any phase in period.³⁰⁷ Using its experience as an example, EWTN contends that nonprofit programmers typically receive no advertising revenues or subscriber fees, but are supported by viewer contributions.³⁰⁸ EWTN claims that captioning costs will add significantly to programming expenses for nonprofit programmers, noting that viewer contributions may not cover existing expenses and are unlikely to cover the additional costs of captioning.³⁰⁹ Similarly, the California Channel proposes an exemption for regional or state public affairs cable networks which televise legislative proceedings and are recognized as exempt organizations under section 501(c)(3) of the Internal Revenue Code.³¹⁰ California Channel is also funded exclusively by contributions and offers no advertising,³¹¹ and contends that a captioning requirement will result in either the significant reduction or elimination of its service.³¹²

96. Program Budget Concerns. Kaleidoscope proposes that programming for which captioning costs would amount to more than 10% of the program budget should be exempt from our captioning requirements.³¹³ Kaleidoscope asserts that caption costs above this threshold may make captioning economically burdensome.³¹⁴ Similarly, Viacom requests an exemption for programs which are either produced on budgets of \$100,000 or less, or that earn license fees of up to \$10,000. Viacom claims that such an exemption will nurture alternative programming sources and diversity of programming.³¹⁵

³⁰⁶ EWTN Reply Comments at 6, citing Conf. Report 104-458, 104th Cong. 2d Sess. 183 ("when considering exemptions under paragraph (d)(1), the Commission shall consider several factors, including but not limited to: . . . (6) the non-profit status of the provider . . . ")

³⁰⁷ *Id.* at 7. Under EWTN's alternative proposal, nonprofit networks would be allowed a ten year phase in period for captioning after the expiration of the six year exemption. *Id.* at 8.

³⁰⁸ *Id.* at 4.

³⁰⁹ *Id.* at 4-5.

³¹⁰ California Channel Reply Comments at 2, 6-8.

³¹¹ *Id.* at 5.

³¹² *Id.* at 6. California Channel states that, even using our lowest cost estimate, captioning costs would consume 20% of its annual budget. *Id.* at 4.

³¹³ Kaleidoscope Comments at 7.

³¹⁴ *Id.* However, MPAA asserts that this proposal is unwarranted because it offers no justification for a requirement that producers submit program budgets to the Commission for inspection. MPAA Reply Comments at 15.

³¹⁵ Viacom Reply Comments at 16-17.

97. Non-English Language Programming. We observed that captioning of non-Latin-based language programming is not technically feasible at this time.³¹⁶ A number of commenters concur with this observation.³¹⁷ However, some commenters claim that advanced television captioning standards are incorporating provisions for non-Latin-based alphabets and recommend that we reconsider any exemption of non-Latin-based language programs when technology to caption such programming becomes widely available.³¹⁸

98. Most providers that comment on the issue support a complete exemption of non-English language programming from our captioning requirements.³¹⁹ Some of these commenters request, at a minimum, an exemption for all non-English language programming that is produced in or acquired from foreign sources.³²⁰ They assert that: (a) the scarcity of captioning services for non-English language captioning is greater than that for English captioning;³²¹ (b) much non-English language programming is imported from countries which do not have captioning requirements;³²² (c) the market for such programs in the U.S. is small, as are the advertising revenues these programs generate, but the costs of non-English language captioning are higher than those for English captioning;³²³ and (d) a captioning requirement would likely result in a reduction in the amount of non-English language programming offered to all viewers.³²⁴ Lincoln and KCSI note that English language captioning of non-English language programming would be of little use, given that the intended audience for such programs is viewers who speak little or no English.³²⁵

³¹⁶ Notice, 12 FCC Rcd at 1076 ¶ 72.

³¹⁷ See, e.g., AIM Comments at 3; Ameritech Comments at 16; Captivision Comments at 6; CBA Comments at 5; KCSI Comments at 1-2; Lincoln Reply Comments at 1-2; NCI Comments at 10; Paxson Comments at 9; VITAC Comments at 6.

³¹⁸ ALDA Comments at 5; Council of Organizational Representatives Reply Comments at 5, n. 3; WGBH Comments at 9.

³¹⁹ See, e.g., AlphaStar Comments at 12; CBS Comments at 14-15; KCSI Comments at 2-3; ICCP Comments at 9; Paxson Comments at 10; Telemundo Comments at 8; Televisa Comments at 3; USSB Comments at 11.

³²⁰ Lincoln Reply Comments at 3-4; Telemundo Comments at 8; Televisa Comments at 3; Univision Comments at 5. See also APS Comments at 22 (seeks exemption for programming imported from England, which is not captioned and would not be exempted under the current proposal).

³²¹ CBS Comments at 14-15; ICCP Comments at 5-6; Telemundo Comments at 5; Televisa Comments at 4-5; VITAC Comments at 6.

³²² CBA Comments at 5; KCSI Comments at 2; Telemundo Comments at 5; Televisa Comments at 6.

³²³ Captivision Comments at 6; CBS Comments at 15; ICCP Comments at 6; Telemundo Comments at 6; Televisa Comments at 5 and 8.

³²⁴ KCSI Comments at 3; Paxson Comments at 9; Televisa Comments at 7.

³²⁵ KCSI Comments at 3; Lincoln Comments at 7.

99. Commenters representing persons with hearing disabilities favor a captioning requirement for programming in non-English languages using Latin-based alphabets. For example, AIM asserts that where there are large, non-English-speaking populations, captioning of essential news and information should be required at a minimum. ALDA declares that non-English language program captioning is warranted to make non-English language programming accessible to late-deafened adults who are already fluent in those languages, and to give viewers with hearing disabilities the same opportunities that other viewers have to learn non-English languages through video programming.³²⁶ NAD and LHH assert that non-English language captioning resources are readily available since many captioning agencies employ captioners proficient in other languages, including Spanish, French and German.³²⁷ However, CAN acknowledges that a temporary exemption for smaller providers of non-English language programming may be warranted.³²⁸

100. We also sought information on the benefits of captioning non-English language programming that serves significant population groups, such as Spanish language programming.³²⁹ Televisa claims that the market for Spanish language captioning is extremely limited, estimating that there are only 1,733,000 Spanish-speaking persons with hearing disabilities in the U.S., and that only 185,000 of those individuals speak only Spanish.³³⁰ VITAC submits that few schools teach Spanish stenotypy,³³¹ and claims it would take at least four years to train Spanish-speaking stenocaptioners to real time caption Spanish newscasts.³³² The company knows of no stenocaptioners capable of non-English real time captioning in any other languages.³³³ Due to these limitations, VITAC recommends that the transition period for real time Spanish language captioning be 25% in six years, 50% in eight years, and 100% in ten years. It notes, however, that off-line Spanish or other Latin-based alphabet captioning could be started within a matter of months.³³⁴

101. Primarily Textual Programming. We proposed to include video programming that is primarily textual, including channels dedicated to on-screen program schedules or guides, stock tickers and bulletin boards, and possibly other selected programs, in the classes of exempt programming.³³⁵ We

³²⁶ AIM Comments at 3; ALDA Comments at 4-5.

³²⁷ LHH Comments at 6; NAD Comments at 11.

³²⁸ CAN Reply Comments at 6.

³²⁹ Notice, 12 FCC Rcd at 1076 ¶ 72.

³³⁰ Televisa Comments at 8 (based on 10% of the Spanish-speaking population in the U.S.).

³³¹ VITAC Comments at 7.

³³² *Id.* at 8.

³³³ *Id.*; see also MCS Comments at 17 (insufficient foreign language captioners available to provide real-time captioning although off-line captioning of pre-scripted material may be possible).

³³⁴ VITAC Comments at 8.

³³⁵ Notice, 12 FCC Rcd at 1076 ¶ 73.

also requested commenters to consider what, if any, definition of primarily textual video programming is needed for our rules.³³⁶ Commenters that address this proposal generally agree that textual programming should be exempt.³³⁷ A number of commenters suggest that the definition of such programming should take into account the purpose of the audio and whether the audio track provides any information necessary to understand the program,³³⁸ while SHHH would evaluate the audio track for content and whether or not it is duplicated in text.³³⁹ Prevue proposes that the Commission exempt:

any programming service which is substantially comprised of alpha-numeric text, with or without accompanying video or graphic elements, and provides viewers with (i) television programming listings, (ii) program schedule information and/or (iii) promotional and/or purchase information regarding programming or services, which in each case are specific to such viewers' multichannel video programming distributor.³⁴⁰

102. PEG Access Programming. We solicited comment on whether PEG access programming should be encompassed by our general exemptions, and whether there are certain types of PEG access programming for which we should require captioning.³⁴¹ Most commenters who discuss this proposal favor a complete exemption of PEG access programming from our closed captioning rules. Many agree with our initial assessment that a captioning requirement would be financially burdensome for PEG programming due to the modest budgets on which most PEG programming operates.³⁴² A number of commenters contend that requiring captions will defeat the goal of providing mass media access to those who otherwise would not have it, by effectively turning free access into access at \$500 to \$2500 an hour

³³⁶ *Id.*

³³⁷ See, e.g., AIM Comments at 3; AlphaStar Comments at 12; Ameritech Comments at 16; Captivision Comments at 6; C-SPAN Comments at 9; DirecTV Comments at 11-12; Prevue Comments at 1; SBCA Comments at 12-13; WGBH Comments at 10.

³³⁸ ALDA Comments at 5; Captivision Comments at 6; CAN Comments at 6; LHH Comments at 7; NVRC Comments at 4-5; NAD Comments at 12. However, NAD also alleges that stock tickers shown on CNBC "are frequently accompanied by essential audio output which should be captioned." NAD Comments at 12.

³³⁹ SHHH Comments at 6.

³⁴⁰ *Id.* at 8.

³⁴¹ Notice, 12 FCC Rcd at 1076 ¶ 74.

³⁴² See, e.g., Alliance Comments at 6-7; Ball State Reply Comments at 18; BellSouth Reply Comments at 15-16; Boulder Comments at 1; CTN Reply Comments at 5; ICCA Comments at 1; Madison Reply Comments at 1; NCTA Comments at 24; Pittsburgh Comments at 1; Pocatello Comments at 2; SBC Comments at 5; SCBA Reply Comments at 10-11; Solon Reply Comments at 1; TCI Reply Comments at 7-9; Time Warner Reply Comments at 5-7; US West Comments at 5. Alliance contends that the average annual budget for a full-service PEG center is \$227,147, with the largest annual budget being \$5.5 million and some of the smallest as low as \$2000. Alliance Comments at 5.